United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7376

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

NO. 76-7376

BLANCHE MITCHELL,

Appellant,

P15

-vs-

NATIONAL BROADCASTING COMPANY and
S. THEODORE NYGREEN, Manager of Information
Services, National Broadcasting Company,

Appellees.

On Appeal From The United States District Court For The
Southern District of New York

REPLY BRIEF OF APPELLANT

JACK GREENBERG
O. PETER SHERWOOD
RONALD L. ELLIS
10 Columbus Circle
Suite 2030
New York, New York 10019

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

THE PLAINTIFF HAS NEVER HAD A FULL AND FAIR OPPORTUNITY TO PRESENT HER CASE

Defendants apparently assume that if they say it often enough, they can make it so. They have liberally used the terms "on-the-merit" and "full and fair opportunity" in an attempt to lend credibility to the procedure followed in plaintiff's case. In support of these conclusions, the defendants extol the "plenary adjudicatory powers" and broad protection against discrimination of the State Division. Defendants, though, somehow ignore the actual facts of the case.

The defendants, for example, assert that "Ms. Mitchell had the right to request the issuance of subpoenas compelling the attendance of witnesses and the production of documents." (Brief for Appellees at 5) What, in fact, happened was that none of plaintiff's subordinates were called as witnesses. These were the persons who allegedly would not work with plaintiff and were near "mutiny". (23 a to 25 a) These were the persons who were intimately involved in the alleged failings of plaintiff. Yet, not one statement from these persons. Instead, the investigator chose to rely on documents.

And what of those documents? The documentation available was almost exclusively the product of defendants. The right of plaintiff to request the production of documents was thus inmaterial since defendants were quite willing to produce their self-serving documents.

Defendants, nevertheless, assert that there was a "full scale investigation." (Brief for Appellees at 46). To buttress this rather dubious contention, they point out that the relevant documents[1/] were examined and that the employees involved in the decision to terminate Ms. Mitchell "were subject to questioning." (Brief for Appellees at 46) This is the same "full scale investigation" which mischaracterized the race of one of plaintiff's subordinates because of her last name (88 a). This is the same "full scale investigation" which failed to indicate when or how the plaintiff was "abusive, bothersome, taunting, argumentative and uncooperative." This is the same "full scale investigation" which failed to explain why plaintiff's alleged poor work performance earned her a 5.9% merit raise or why there is nothing on the record to indicate that

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1/ Defendants have indeed gotten the most out of these documents. It was these documents which were part and parcel of defendants' discriminatory actions. These same documents served to shield defendants in the eyes of the investigator.

Ms. Mitchell's performance was below standard until defendant Nygreen became Manager of Information Services. The defendants apparently deem these things not within the ken of an investigation.

There was, in fact, no sworn testimony, no witnesses subpoenaed, no cross examination and, perhaps most importantly, no counsel for plaintiff who might better have presented the issues and produced an adequate record. Therein lies the fallacy of defendants' contentions, for, all other arguments aside, the plaintiff has never had a determination of her claim which afforded her a full and fair opportunity to be heard.

The instant case is in marked contrast to Taylor v. N.Y.C. Transit Authority, 433 F.2d 665 (2d Cir. 1970) a case defendants characterize as "dispositive". (Brief for Appellees at 17) Whatever else the case may stand for, it certainly does not support a contention that what occurred in the instant case was a full and fair adjudication. In Taylor, the plaintiff had been dismissed after a formal departmental hearing. He appealed this dismissal to the Civil Service Commission. Thereupon the Civil Service Commission conducted a "judicial-like adversary proceeding in which the parties

were represented by counsel."[2/] 433 F.2d at 667.

The defendants seek to imbue the State Division, proceedings with an "'on-the-merits' quality" by suggesting that it be treated as either a dismissal for failure to state a cause of action or a verdict based on insufficient proof.

As to the first, it is well established that a complaint will not be dismissed for failure to state a claim "unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." 2A Moore's Federal Practice ¶12.08 at 2245; Dioguardi v. Durning, 139 F.2d 774 (2nd Cir. 1944). The investigator, however, determined that Ms. Mitchell's claims were overcome by defendants' documentary evidence and not that there was no cognizable claim.

Even on this thin record, there is clearly no basis for the contention that this is an appropriate case for summary judgment. Cf. Federal Rules of Civil Procedure, Rule 56. There were genuine issues of fact to be determined, including 1) whether the accusations in defendants' memoranda were true and 2) whether plaintiff's race was the reason for

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2/ The court also noted that the Commission had afforded the plaintiff "procedural due process." 433 F.2d 671. cf. Paramount Transport Systems v. Chauffeurs Local 150, 436 F.2d 1064 (9th Cir. 1971).

her harassment and eventual discharge. The existence of these material facts is evident despite plaintiff's lack of the usual discovery devices (e.g. depositions or interrogatories) and the absence of any affidavits by defendants.[3/]

The defendants' theory of "on-the-merits" based on a failure of proof is even less acceptable. It assumes, first of all, that plaintiff had a full and fair opportunity to litigate her claim, a clearly unwarranted assumption. As was the plaintiff in Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90 (D. Conn. 1975), plaintiff here was limited by the investigator. In Hollander the investigator decided that plaintiff's charges lacked evidentiary support. In the present case, the investigator made the same finding, informal conferences notwithstanding.[4/]

Defendants assert that the reason plaintiffs file with local agencies is not "because they have been forced in that direction by the deferral provisions of Title VII." (Brief of Appellees at 31) Plaintiff agrees. Aggrieved individuals,

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3/ Defendants submitted the affidavit of counsel (10 a - 13 a) but none of their own. Of course, there were no statements at all from other employees, subordinate to plaintiff.

4/ Defendants attempt to distinguish the case on the conferences afforded plaintiff, when, in fact, the investigator relied on documents in making his determination. With no evidence from third parties (i.e. other employees), it was but an exercise in futility for plaintiff to assert that she was competent.

acting without counsel, as a practical matter are not in a position to affirmatively elect between Title VII and some other statutory scheme. They are forced to the local agency because they have neither the money nor the representation to go elsewhere. It is for this reason that the concept of election of remedies is particularly inappropriate at such a time.

Defendants' assertion that the protection against discrimination under the New York State Human Rights Law is broader than under §1981 (Brief for Appellees at 30) ignores one critical factor - the absence of counsel. The aid of counsel is extremely important in marshalling and evaluating evidence and framing issues. The plaintiff before the State Division is not provided with counsel[5/] and the law makes no provision for counsel fees. The charges of plaintiff are not presented in an adversary context.[6/] (Defendants, of

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5/ The distinction urged by defendants between the present case and New York State Division of Human Rights v. University of Rochester, _____App. Div. 2d_____, 386 N.Y.S. 2d 147 (4th Dept. 1976), would suggest that retaining counsel is in fact discouraged.

6/ Plaintiff had to be content with an investigator "who never followed up on any of the things I wanted him to investigate; only on what the company told him." (86a) In addition, plaintiff was not allowed to see, or comment on, documents that the defendants showed the investigator.

course, are represented by counsel) Rather, the investigator seeks to implement the conference and conciliation procedures established by statute.

Given the procedural deficiencies in the State Division, particularly the absence of a formal hearing, it would be inappropriate to apply the doctrine of res judicata on the facts of this case.

Plaintiff, therefore, submits that it was error to apply the doctrine of res judicata to a suit under 42 U.S.C. §1981 because of prior state proceedings. Further, the proceedings in the instant case were not sufficient to warrant imposition of the doctrine.

CONCLUSION

Because the District Court erred in granting the motion for summary judgment, plaintiff-appellant respectfully submits that the decision should be reversed and the case remanded for a trial on the merits.

Respectfully submitted,

O. PETER SHERWOOD

RONALD L. ELLIS

JACK GREENBERG
O. PETER SHERWOOD
RONALD L. ELLIS
10 Columbus Circle
New York, New York 10019

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that I have this 2nd day of December, 1976, mailed a copy of the foregoing REPLY BRIEF OF APPELLANT upon counsel for Appellees:

Howard L. Ganz
Proskauer, Rose, Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

by placing same in the United States mail, adequate postage prepaid.

ATTORNEY FOR APPELLANT